

**DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA**

IN THE MATTER OF the Joint Application of	)	REGULATORY DIVISION
Liberty Utilities Co., Liberty WWH, Inc., Western	)	
Water Holdings, LLC, and Mountain Water Company	)	DOCKET NO. D2014.12.99
for Approval of a Sale and Transfer of Stock	)	
	)	
	)	

**CLARK FORK COALITION’S  
RESPONSE TO  
NOTICE OF OPPORTUNITY TO COMMENT**

Intervenor Clark Fork Coalition (the “Coalition”) files the following in response to the *Notice of Opportunity to Comment*, issued by the Montana Public Service Commission (the “Commission”) on January 13, 2016 (the “*Notice*”).

On December 14, 2014, Liberty Utilities Co., Liberty WWH, Inc., Western Water Holdings, LLC, and Mountain Water Company (the “Joint Applicants”) filed an application with the Commission for approval of the sale of Missoula’s public water utility from a global investment firm to a Canadian corporation. *Joint Application for Approval of a Sale and Transfer of Stock* (the “*Joint Application*”). The Coalition was granted intervention in this docket and the Commission proceeded in its review pursuant to *Procedural Order 7392*, issued on Feb. 9, 2015.

Throughout the proceedings, the Coalition and the City have both argued that the parent company of Liberty Utilities, Algonquin Power and Utilities Corporation (“APUC”) must be ordered to appear in this docket, as it is the real acquiring entity of Mountain Water Company.

*See, e.g., Clark Fork Coalition's Motion for Algonquin Power & Utilities Corp. to Appear in Proceedings* (Feb. 13, 2015). Likewise, John Wilson has testified on behalf of the Montana Consumer Counsel that, "[i]t is clear that APUC is the real acquiring entity in this case . . . APUC has arranged and controlled virtually all of the funding and organization for the acquisition of Park Water (and Mountain Water). APUC has also touted the Park Water/Mountain Water acquisition as APUC's acquisition in its press releases and in its reports to investors and stockholders" *Direct Testimony of Dr. John W. Wilson on behalf of the Montana Consumer Counsel*, pp. 9-10 (Nov. 4, 2015). Wilson has also provided testimony that APUC stands to realize \$20 million per year of finance cost savings that will not be passed on to Mountain Water Company's ratepayers, and according to Wilson, "[i]t is hard to see how this large disparity between stockholder benefits and consumer burdens can support a conclusion that the proposed acquisition is in the public interest." *Direct Testimony of John W. Wilson*, p. 8. The Commission denied all motions to require APUC to appear as an applicant.

In the meantime, on June 15, 2015, Montana Fourth Judicial District Court Judge Karen Townsend found that public necessity dictates that the water system should be under local, public ownership under the control of City of Missoula (the "City"), and a five-day hearing in November 2015 resulted in a determination of fair market value. The City, therefore, is in a position to exercise its right to take the water system at any time. *City of Missoula's Notice of Issuance of Preliminary Order of Condemnation and Motion to Dismiss or, in the Alternative, to Stay the Proceedings*, p. 1 (June 24, 2015).

Still, the Joint Applicants, along with the Commission, have insisted during the past year that the Commission's review and authorization of the sale agreement in this docket move forward. The Joint Applicants and the Commission have also resisted any attempt to put the

Commission's review on hold until the condemnation process concludes, and argued in district court that the proceedings should not be stayed. Nonetheless in early January 2016, the Joint Applicants withdrew the application to the Commission and closed on the sale – even though the Commission had not yet analyzed the hundreds of pages of testimony and data responses filed in this docket, nor held a public hearing to provide Mountain Water Company ratepayers the opportunity to voice their concerns.

In the wake of the Joint Applicants' withdrawal of the *Joint Application* and purported transfer of ownership of Mountain Water Company to APUC/Liberty, the Commission's *Notice* asks the parties for comments on seven issues. The Coalition's comments below are focused on Issue 1 (jurisdiction in general), Issue 4 (violation of any specific statutes, rules or orders), and Issue 7 (comments in general).

### **COMMENTS**

#### **1. Jurisdiction in general.**

The argument that the Commission lacks jurisdiction over the sale and transfer of Mountain Water Company is not a new one. Mountain Water attempted to make the case that the Commission lacked jurisdiction in docket D2011.1.8 when it applied for approval for transfer of ownership to the Carlyle Group. *Petition for a Declaratory Ruling Disclaiming Commission Jurisdiction over the Sale and Transfer of Stock in Park Water Company and Application for Approval of the Sale and Transfer of Stock in Park Water Company*, Docket D2011.1.8 (Jan. 24, 2011). The Commission's Orders No. 7149c (Sept. 14, 2011) and 7149d (Dec. 14, 2011) in docket D2011.1.8 clearly lay out the legal basis for the Commission's jurisdiction over sales, transfers and mergers of utilities. The Coalition agrees with the Commission's rationale set forth in Order 7149c and Order 7149d.

The Joint Applicants have diligently prosecuted their case for over a year— premised on the notion that the Commission has jurisdiction over the sale. The Joint Applicants’ assertion on January 11, 2016 that the Commission lacks jurisdiction was a sudden about-face in their rationale, and suggests that the Joint Applicants may have some other business interests in play. However, the Joint Applicants cannot pick and choose under what circumstances to seek approval of the Commission for a sale of a regulated public utility. While Mountain Water Company is privately owned, ownership issues fall squarely within the Commission’s jurisdiction. Commission approval is a prerequisite for transferring ownership in Mountain Water Company, not a convenience.

4. Violation of any specific statutes, rules or orders.

It is the Coalition’s position that the transfer of ownership of Mountain Water Company by the Joint Applicants without Commission approval is a violation of the Commission’s previous orders that it “has jurisdiction over and must approve any sale or transfer of a public utility, its assets or utility obligations in order to assure generally that utility customers will receive adequate service and facilities, that utility rates will not increase as a result of the sale or transfer, and that the acquiring entity is fit, willing and able to assume the service responsibilities of a public utility.” Order No. 7149c (citing *In re the Joint Application of Energy West Incorporated and Cut Bank Gas Company*, Docket No. D2008.3.27, Order No. 6907b, Conclusions of Law ¶ 6 (Nov. 2, 2009).) Further, as noted in the Commission’s *Notice*, the Commission specifically ordered that it must review any future sale of Mountain Water Company. *In re the Consolidated Petition by Mountain Water Company for Declaratory Rulings and Application for Approval of Sale and Transfer of Stock in Park Water Company*, Docket D2011.1.8, Order No. 7149d.

The *Notice* suggests that the Commission is considering whether imposing fines on the Joint Applicants pursuant to Mont. Code Ann. § 69-3-209 is appropriate. The Coalition asserts that fines alone are insufficient to protect the public interest. The Coalition urges the Commission to immediately seek injunctive relief in district court pursuant to its authority under Mont. Code Ann. § 69-3-110(5). *See, Mont. Power Co. v. Public Serv. Comm.*, 206 Mont. 359, 671 P.2d 604 (1983) (holding that the Commission must seek injunctive relieve through the courts).

7. Comments in general.

Almost exactly five years ago, when the Carlyle Group first applied to the Commission for approval to purchase Mountain Water Company, the Missoula community's public water utility and water rights were flung into the complex world of investor-driven decision making which has nothing to do with the long-term delivery of clean, reliable water and everything to do with out-of-state interests and foreign corporations seeking to profit from Missoula's most valuable natural resource. The Coalition intervened in docket D2011.1.8 in 2011, over strenuous objection from Mountain Water Company, to ensure that the Commission and any future owner of Missoula's water system did not lose sight of the critical importance of the water resources that are tapped to provide drinking water to Missoula. In that docket, the Coalition, along with the City, was able to secure an agreement with the Carlyle Group that provided protections for the water rights held by Mountain Water Company. *See, Letter Agreement* (Sept. 11, 2011), Docket D2011.1.8, Order No. 7149d, Attachment A.


The Coalition intervened in this docket for the same reasons. While most of the hundreds of pages of filings to date have centered on confidential financial models, predicted earnings, and cost of capital, the Coalition asserts that this case is really about control over one simple yet

irreplaceable natural asset that is fundamental to the Missoula community's survival and our way of life – Our Water.

The Joint Applicants' decision to consummate the transaction at issue in this docket, without Commission authorization, amounts to an unprecedented and illegally-orchestrated purported takeover of Missoula's water by a foreign corporation. Until the City of Missoula exercises its right to take control of the water system, the Commission must aggressively assert its authority to protect the public interest, act immediately to prevent harm and diminution to the assets of Mountain Water Company, and ensure our water is safeguarded from exploitation by those seeking to profit from it.

Respectfully submitted this 27th day of January, 2016.

**CLARK FORK COALITION**

By:   
Barbara Chillcott  
Legal Director  
140 S. 4<sup>th</sup> Street West, Unit 1  
PO Box 7593  
Missoula, Montana 59601  
(406) 546-3469  
[barbara@clarkfork.org](mailto:barbara@clarkfork.org)

## **CERTIFICATE OF SERVICE**

I hereby certify that on January 27, 2016, the foregoing CLARK FORK COALITION'S RESPONSE TO NOTICE OF OPPORTUNITY TO COMMENT was served via email and U.S. mail on:

Thorvald A. Nelson  
Nickolas S. Stoffel  
Holland & Hart LLP  
6380 South Fiddlers Green Circle  
Suite 500  
Greenwood Village, CO 80111

John Kappes  
President & General Manager  
Mountain Water Company  
1345 West Broadway  
Missoula, MT 59802-2239

Christopher Schilling, CEO  
Leigh Jordan, Executive VP  
Park Water Company  
9750 Washburn Road  
Downey, CA 90241

Michael Green  
John Semmens  
Crowley Fleck PLLP  
100 North Park, Suite 300  
PO Box 797  
Helena, MT 59624-0797

Todd Wiley  
Assistant General Counsel  
Liberty Utilities  
12725 West Indian School Road,  
Suite D-101  
Avondale, AZ 85392

Robert Nelson  
Montana Consumer Counsel  
111 North Last Chance Gulch, Suite 1B  
Box 201703  
Helena, MT 59620-1703

Jim Nugent  
City Attorney  
The City of Missoula  
City Attorney's Office  
435 Ryman Street  
Missoula, MT 59802

Scott Stearns  
Natasha Prinzing Jones  
BOONE KARLBERG P.C  
P.O. Box 9199  
Missoula, MT 59807-9199

The foregoing was served electronically on:

cakennedy@hollandhart.com  
aclee@hollandhart.com  
cuda@crowleyfleck.com  
tsunderland@boonekarlberg.com  
jlangston@mt.gov  
lfarkas@mt.gov

Bryan.Lin@carlyle.com  
SSnow@mt.gov  
rtanner@boonekarlberg.com  
tstockton@boonekarlberg.com

The foregoing was e-filed and mailed to the Commission:

Public Service Commission  
1701 Prospect Avenue  
P. O. Box 202601  
Helena, MT 59620-2601

By:   
Barbara Chillcott